

**Mar 25, 2019**

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

JANET F.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:17-cv-00419-MKD

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 12, 13

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 12, 13. The parties consented to proceed before a magistrate judge. ECF No. 4. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion, ECF No. 12, and denies Defendant's motion, ECF No. 13.

**JURISDICTION**

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

## STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination."

1 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
2 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
3 *Sanders*, 556 U.S. 396, 409-10 (2009).

#### 4 **FIVE-STEP EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered “disabled” within  
6 the meaning of the Social Security Act. First, the claimant must be “unable to  
7 engage in any substantial gainful activity by reason of any medically determinable  
8 physical or mental impairment which can be expected to result in death or which  
9 has lasted or can be expected to last for a continuous period of not less than twelve  
10 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
11 impairment must be “of such severity that [she] is not only unable to do [her]  
12 previous work[,] but cannot, considering [her] age, education, and work  
13 experience, engage in any other kind of substantial gainful work which exists in  
14 the national economy.” 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

15 The Commissioner has established a five-step sequential analysis to  
16 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
17 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
18 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
19 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
20

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
2 404.1520(b), 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis  
4 proceeds to step two. At this step, the Commissioner considers the severity of the  
5 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
6 claimant suffers from "any impairment or combination of impairments which  
7 significantly limits [her] physical or mental ability to do basic work activities," the  
8 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the  
9 claimant's impairment does not satisfy this severity threshold, however, the  
10 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
11 404.1520(c), 416.920(c).

12 At step three, the Commissioner compares the claimant's impairment to  
13 severe impairments recognized by the Commissioner to be so severe as to preclude  
14 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
15 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
16 severe than one of the enumerated impairments, the Commissioner must find the  
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant's impairment does not meet or exceed the  
19 severity of the enumerated impairments, the Commissioner must pause to assess  
20 the claimant's "residual functional capacity." Residual functional capacity (RFC),

1 defined generally as the claimant's ability to perform physical and mental work  
2 activities on a sustained basis despite her limitations, 20 C.F.R. §§ 404.1545(a)(1),  
3 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's  
5 RFC, the claimant can perform work that she has performed in the past (past  
6 relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the  
7 claimant can perform past relevant work, the Commissioner must find that the  
8 claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is  
9 incapable of performing such work, the analysis proceeds to step five.

10 At step five, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant can perform other work in the national economy. 20 C.F.R. §§  
12 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination, the  
13 Commissioner must also consider vocational factors such as the claimant's age,  
14 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
15 416.920(a)(4)(v). If the claimant can adjust to other work, the Commissioner must  
16 find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).  
17 If the claimant is not capable of adjusting to other work, analysis concludes with a  
18 finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R.  
19 §§ 404.1520(g)(1), 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.  
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
4 capable of performing other work; and (2) such work “exists in significant  
5 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2);  
6 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 7 **ALJ’S FINDINGS**

8 Plaintiff applied for Title II disability insurance benefits on November 6,  
9 2015, and for Title XVI supplemental security income benefits on November 8,  
10 2015. Tr. 15, 164-65. Plaintiff alleges a disability onset date of July 1, 2013. Tr.  
11 41. The applications were denied initially, Tr. 103-06, and on reconsideration, Tr.  
12 108-10. Plaintiff appeared before an administrative law judge (ALJ) on January  
13 20, 2017. Tr. 37-79. On April 25, 2017, the ALJ denied Plaintiff’s claim. Tr. 12-  
14 33.

15 At step one of the sequential evaluation process, the ALJ found Plaintiff has  
16 not engaged in substantial gainful activity since July 1, 2013. Tr. 17. At step two,  
17 the ALJ found that Plaintiff has the following severe impairments: degenerative  
18 joint disease of the left knee and left shoulder. Tr. 17. At step three, the ALJ  
19 found Plaintiff does not have an impairment or combination of impairments that  
20

1 meets or medically equals the severity of a listed impairment. Tr. 19. The ALJ  
2 then concluded that Plaintiff has the RFC to perform sedentary work:

3 [E]xcept she cannot kneel, crouch, crawl, or climb ladders, ropes, or  
4 scaffolds, and she can only rarely (10% or less of the time) climb  
5 stairs; she can perform other postural activities only occasionally; she  
6 cannot operate foot controls with the left lower extremity and cannot  
7 use one upper extremity while walking because of her use of a cane;  
she can only occasionally push, pull, and reach overhead with the left  
upper extremity; and she can have no concentrated exposure to  
extreme cold or heat, vibrations, or hazards such as unprotected  
heights and moving mechanical parts.

8 Tr. 20.

9 At step four, the ALJ found Plaintiff is unable to perform any past relevant  
10 work. Tr. 25. At step five, the ALJ found that, considering Plaintiff's age,  
11 education, work experience, RFC, and testimony from the vocational expert, there  
12 were jobs that existed in significant numbers in the national economy that Plaintiff  
13 could perform, such as, receptionist and switchboard operator. Tr. 27. Therefore,  
14 the ALJ concluded Plaintiff was not under a disability, as defined by the Social  
15 Security Act, from the alleged onset date of July 1, 2013, though the date of the  
16 decision. Tr. 27.

17 On October 20, 2017, the Appeals Council denied review of the ALJ's  
18 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for  
19 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0

1. Whether the ALJ properly evaluated the medical opinion evidence;
2. Whether the ALJ conducted a proper step-three analysis; and
3. Whether the ALJ conducted a proper step-five analysis.

## DISCUSSION

Plaintiff contends the ALJ improperly weighed the opinions of Harvey Alpern, M.D.; Timothy Ritchey, M.D.; Arild Lein, M.D.; Leland Rogge, M.D.; Jerry Park, D.O; David Green, M.D.; Thomas Miller, D.O.; P. Michael O'Brien, M.D.; and Gordon Hale, M.D.

ORDER - 8



1 Generally, a treating physician's opinion carries more weight than an examining  
2 physician's opinion, and an examining physician's opinion carries more weight  
3 than a reviewing physician's opinion. *Id.* at 1202. "In addition, the regulations  
4 give more weight to opinions that are explained than to those that are not, and to  
5 the opinions of specialists concerning matters relating to their specialty over that of  
6 nonspecialists." *Id.* (citations omitted).

7       If a treating or examining physician's opinion is uncontradicted, the ALJ  
8 may reject it only by offering "clear and convincing reasons that are supported by  
9 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
10 "However, the ALJ need not accept the opinion of any physician, including a  
11 treating physician, if that opinion is brief, conclusory, and inadequately supported  
12 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
13 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or  
14 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ  
15 may only reject it by providing specific and legitimate reasons that are supported  
16 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81  
17 F.3d 821, 830-31 (9th Cir. 1996)). The opinion of a nonexamining physician may  
18 serve as substantial evidence if it is supported by other independent evidence in the  
19 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

1           *1. Dr. Alpern*

2           Dr. Alpern, an internal medicine and cardiovascular disease physician,  
3 testified as the impartial medical expert. Tr. 406. Dr. Alpern diagnosed Plaintiff  
4 with degenerative joint disease of both knees and the left shoulder. Tr. 42. Dr.  
5 Alpern testified that Plaintiff's conditions together met Listing 1.02. Tr. 42. Dr.  
6 Alpern also opined that Plaintiff could perform sedentary work, lift ten pounds  
7 occasionally, lift less than ten pounds frequently, stand and walk for two hours, sit  
8 for six hours, ambulate with a cane, and occasionally push, pull, and reach  
9 overhead with the left upper extremity. Tr. 44. Dr. Alpern testified that Plaintiff's  
10 knee condition was a painful condition and that because of the pain she would be  
11 absent more than two days a month and also recognized that because Plaintiff's  
12 treating physician Dr. Richey mentioned that Plaintiff had swelling in the knees  
13 that Plaintiff probably needed to elevate her legs when lying down or taking  
14 breaks. Tr. 45-46.

15           The ALJ assigned Dr. Alpern's opinion partial or little weight. Tr. 23-24.  
16 Because Dr. Alpern's opinion was contradicted by the nonexamining opinions of  
17 Dr. O'Brien, Tr. 84-86, and Dr. Hale, Tr. 96-98, the ALJ was required to provide  
18 specific and legitimate reasons for rejecting Dr. Alpern's opinion. *See Bayliss*, 427  
19 F.3d at 1216.

1 First, the ALJ discounted Dr. Alpern's opinion because it was internally  
2 inconsistent. Tr. 23. Relevant factors to evaluating any medical opinion include  
3 the amount of relevant evidence that supports the opinion and the consistency of  
4 the medical opinion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007);  
5 *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Here, the ALJ found that Dr.  
6 Alpern's initial testimony that Plaintiff met Listing 1.02 was inconsistent with his  
7 subsequent testimony that Plaintiff "did not have bilateral knee impairments, and  
8 did not have inability to ambulate effectively such as the use or need for a walker  
9 or two canes, or similarly situational accommodation for both sides." Tr. 23.  
10 Contrary to the ALJ's conclusion, Dr. Alpern testified that Plaintiff *did* have  
11 bilateral knee impairments. Tr. 42. Although Dr. Alpern recognized that  
12 Plaintiff's knee problems were primarily with her left knee, he also testified that  
13 the medical record, including x-rays, supported bilateral knee impairments. Tr. 42.  
14 The Court has not located nor did Defendant identify any instance where Dr.  
15 Alpern testified that Plaintiff did not have bilateral knee impairments. Moreover,  
16 consistent with Dr. Alpern's testimony, bilateral knee x-rays in December 2015  
17 revealed minimal degenerative joint disease bilaterally. Tr. 567-68.

18 Next, the ALJ concluded that Dr. Alpern's testimony that Plaintiff's knee  
19 impairment combined with her shoulder impairment jointly met Listing 1.02 was  
20 inconsistent with his later opinion that Plaintiff could perform sedentary level

1 work, which was consistent with the ALJ's RFC. Tr. 23, 20 (citing Tr. 42-44). If a  
2 claimant has a combination of impairments, not one of which meets a listing, the  
3 Commissioner compares the findings with those for closely analogous listed  
4 impairments. Soc. Sec. Rlg. 17-2p. "If the findings related to the impairments are  
5 at least of equal medical significance to those of a listed impairment," the  
6 combination of impairments is found to be medically equivalent to that listing. *Id.*  
7 Here, Dr. Alpern opined that Plaintiff met Listing 1.02 because, even though she  
8 did not use a walker or canes in both holds and therefore did not directly satisfy  
9 Listing 1.02, her limited use of her left shoulder resulted in the medical equivalent  
10 to Listing 1.02 as Plaintiff had bilateral knee issues, she used a cane in her right  
11 hand to provide stability for her left knee, and the use of her left upper extremity  
12 was limited. Tr. 42-44. Moreover, Dr. Alpern testified that Plaintiff was unable to  
13 ambulate effectively. Tr. 43. While internal-opinion inconsistency is a factor to  
14 consider, that one meets a listing requirement is not inherently inconsistent with a  
15 sedentary-work RFC. Under the five-step sequential evaluation, the determination  
16 of whether one satisfies a listing is a different legal question than determining the  
17 claimant's RFC. *See* 20 C.F.R. §§ 404.1520(d), (e), 416.920(d), (e) (identifying  
18 that the ALJ determines the RFC only if the impairment does not meet or equal a  
19 listed impairment). That Dr. Alpern opined that Plaintiff could perform sedentary  
20 work was not a legitimate and specific reason alone to discount Dr. Alpern's

1 opinion that Plaintiff met Listing 1.02 when the cumulative impact of her  
2 impairments was considered.

3       Second, the ALJ credited Dr. Alpern's opinion that Plaintiff could do  
4 sedentary work because it was consistent with the objective medical record. Tr.  
5 23-24. An ALJ may choose to credit an opinion that is more consistent with the  
6 evidence in the record. 20 C.F.R. § 416.927(c)(4); *Nguyen v. Chater*, 100 F.3d  
7 1462, 1464 (9th Cir. 1996). Here, the ALJ found that a sedentary-work limitation  
8 was consistent with the record and the other medical source opinions. In making  
9 this assessment, the ALJ concluded: "[c]ontrary to Dr. Alpern's testimony,  
10 [Plaintiff] clarified that while she did have a history of two arthroscopic surgeries  
11 on the right knee, this was well over 10 years ago, and she had not experienced any  
12 problems or difficulties with her right knee since." Tr. 24. The ALJ noted that  
13 Dr. Alpern likely concluded that Plaintiff's right knee limited her because of the  
14 notes in the medical file that Plaintiff had "two scopes right knee," Tr. 308, and  
15 "internal derangement of both knees," Tr. 350-58. Plus, the ALJ found that the  
16 recent treatment records revealed no complaints about Plaintiff's knee giving out.  
17 Tr. 21. When the record is reviewed as a whole, these findings are not supported  
18 by substantial evidence. *See Holohan*, 246 F.3d at 1205 (requiring the ALJ to read  
19 an opinion in full and in the context of the entire record). As an initial matter,  
20 contrary to the ALJ's recitation of Plaintiff's testimony, Plaintiff in fact testified

1 that she had pain in her right knee. Specifically, Plaintiff testified that she  
2 experienced pain in *both* knees that radiated to her calves when she stood in one  
3 place, sat, or walked for too long. Tr. 58, 61-63. While Plaintiff testified that  
4 immediately after her right knee surgery, she did not have a problem, Tr. 70, the  
5 record reflects that Plaintiff began suffering pain and mobility issues again in her  
6 knees within three months after her left knee surgeries, consistent with her bilateral  
7 degenerative joint disease, *see, e.g.*, Tr. 382, 336, 383-85, 333-34, 320, 318, 355-  
8 57. In addition, Plaintiff also testified that because she had been compensating for  
9 her left knee for years, she now experienced stabbing pain and giving out in her  
10 right knee. Tr. 64-65. Moreover, Plaintiff's testimony is consistent with her  
11 reports of right knee pain to her medical providers and the consultative examiners  
12 beginning in 2015, *see, e.g.*, Tr 355 (May 2015: "now starting to have pain on the  
13 right side"); Tr. 374 (Aug. 2015: reporting increasing pain of both left and right  
14 knees); Tr. 567-68 (Dec. 2015: reporting that right knee is worse than left knee  
15 pain); Tr. 523 (April 2016: same); Tr. 555 (Dec. 2016: reporting right knee pain);  
16 Tr. 541 (reporting that her right knee gave out on her a couple of occasions).  
17 Furthermore, Plaintiff's testimony and reports about her right knee pain are  
18 consistent with the medical evidence, which reflected: the right knee's range of  
19 movement was restricted, Tr. 316; tenderness over the lateral aspect of the right  
20 knee, Tr. 374; bilateral minimal degenerative joint disease, Tr. 499, 567-68 (x-

1 rays); medial joint line tenderness on both knees, Tr. 510; some minimal effusion  
2 of the right knee, Tr. 524; continued use of the cane to provide stability, Tr. 511,  
3 555; and an antalgic gait or a limp, Tr. 322, 328-29, 333-37, 374, 541, 553, 555.

4 Without further explanation, the ALJ's finding that a sedentary-work limitation  
5 was consistent with Plaintiff's testimony is not supported by the record.

6 The ALJ also credited Dr. Alpern's sedentary opinion on the grounds that it  
7 was consistent with the other medical source opinions. Tr. 23-24. The ALJ did  
8 not identify the "other medical source opinions" consistent with Dr. Alpern's  
9 opinion that Plaintiff could perform sedentary work, which is defined as:

10 involv[ing] lifting no more than 10 pounds at a time and occasionally  
11 lifting or carrying articles like docket files, ledgers, and small atolls.  
12 Although a sedentary job is defined as one which involves sitting, a  
13 certain amount of walking and standing is often necessary in carrying  
14 out job duties. Jobs are sedentary if walking and standing are required  
15 occasionally and other sedentary criteria are met.

16 20 C.F.R. § 404.1567. In turn, "occasionally" means:

17 occurring from very little up to one-third of the time. Since being on  
18 one's feet is required "occasionally" at the sedentary level of exertion,  
19 periods of standing or walking should generally total no more than  
20 about 2 hours of an 8-hour workday, and sitting should generally total  
approximately 6 hours of an 8-hour workday.

21 SSR 83-10. Turning to the other medical source opinions, Dr. Ritchey (a treating  
22 physician) opined in 2016 that Plaintiff could sit for thirty minutes at one time,  
23 stand for ten minutes at one time, and sit and stand/walk for less than two hours  
24 total in an eight-hour work day and needed a job that permitted shifting from

1 sitting to standing to walking. Tr. 482. Treating physician Dr. Park opined in  
2 2014 that Plaintiff could perform a sitting-only job in a wheelchair for four hours  
3 per day. Tr. 317. The other treating physician of record, Dr. Miller, agreed with  
4 examining orthopedic surgeon Dr. Green, who opined in 2013 that Plaintiff was  
5 limited to sitting, standing, and walking for one hour at a time and could only sit,  
6 stand, or walk one hour each during an eight-hour work day. Tr. 296. Examining  
7 physician Dr. Rogge opined in 2014 that Plaintiff could sit for two hours at a time  
8 but was unable to walk or stand for an hour. Tr. 315. In 2015, the final examining  
9 physician Dr. Lein opined that Plaintiff was limited to light work as she was able  
10 to walk or stand six out of eight hours of the day. Tr. 415. The nonexamining  
11 physicians Dr. O'Brien and Dr. Hale opined in 2015 that Plaintiff could stand  
12 and/or walk for four hours a day and sit for six hours a day. Tr. 84-86, 96-98. This  
13 full review of the other medical opinions reveals that there were no other  
14 physicians who opined that Plaintiff could perform sedentary work. Instead, 1)  
15 some physicians opined that Plaintiff was unable to perform sedentary work: Dr.  
16 Ritchey, Dr. Park, Dr. Rogge, Dr. Green, Dr. Miller, and 2) some physicians  
17 opined that Plaintiff could perform light work: Dr. Lein, Dr. O'Brien, and Dr.  
18 Hale. Because the identified reasons for crediting Dr. Alpern's opinion that  
19 Plaintiff could perform sedentary work—that Plaintiff testified she did not have  
20 any difficulties with her right knee and the other medical source opinions were



1 consistent with sedentary work—are not supported by the evidence, the ALJ’s  
2 decision to credit Dr. Alpern’s sedentary opinion is likewise unsupported.

3 Third, the ALJ discounted Dr. Alpern’s opinion that Plaintiff would miss  
4 two days of work per month because of pain because it was speculative. Tr. 24.

5 An ALJ may reject a medical opinion if it is conclusory, inadequately supported, or  
6 not supported by the record. *Bray*, 554 F.3d at 1228; *Thomas v. Barnhart*, 278  
7 F.3d 947, 957 (9th Cir. 2002); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d  
8 1190, 1195 (9th Cir. 2004). As a nonexamining medical expert, who reviewed the  
9 full medical record, Dr. Alpern was permitted to opine as to Plaintiff’s residual  
10 functional capacity, including her ability to sustain attendance at work. The ALJ  
11 does not identify how Dr. Alpern’s opinion is speculative nor did the ALJ ask Dr.  
12 Alpern to clarify or support this opinion during the hearing. *See Regennitter v.*  
13 *Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1299 (9th Cir. 1999) (“[C]onclusory  
14 reasons will not justify an ALJ’s rejection of a medical opinion.”). Moreover, Dr.  
15 Alpern testified that Plaintiff’s knees condition was painful and, consistent with  
16 Dr. Richey’s statements, Plaintiff would need to elevate her swollen leg(s). Tr. 45-  
17 46. On this record, it was not a legitimate and specific reason to discount Dr.  
18 Alpern’s opinion on the grounds that it was speculative.

19 Finally, the ALJ discounted Dr. Alpern’s attendance opinion because  
20 Plaintiff used a conservative pain management regimen. Tr. 24. An ALJ may give

1 less weight to a medical opinion that recommends conservative treatment. *Rollins*  
2 *v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). Here, as the testifying expert, Dr.  
3 Alpern was not a medical provider who recommended treatment. Instead, Dr.  
4 Alpern reviewed the medical record, which reflected that several physicians  
5 prescribed opiates to Plaintiff to assist with pain following two left knee surgeries  
6 to repair a meniscal tear. *See, e.g.*, Tr. 203, 290, 317, 374, 524, 528, 541, 553-56.  
7 Plaintiff testified that she tried not to rely too much on the narcotic pain medicine  
8 but instead tried to use a non-narcotic, Tylenol Arthritis, to reduce pain symptoms.  
9 Tr. 58-60. In addition, Plaintiff sought relief for her left knee pain through  
10 injections, but these did not provide much pain relief. Tr. 385 (May 10, 2013), Tr.  
11 387-88 (Sept. 2013), Tr. 389 (Feb. 2014), Tr. 510-11. Even though Plaintiff tried  
12 to minimally use narcotic pain medicine, she still regularly refilled narcotic  
13 prescriptions. *See, e.g.*, Tr. 553 (indicating that Plaintiff used 120 hydrocodone  
14 tablets over a three-month period, which is at least 1 hydrocodone pill daily). The  
15 record also reflects that physicians counseled Plaintiff about the addictiveness of  
16 the prescribed narcotic pain medicine. Tr. 317, 390, 524, 553-54, 556. The ALJ's  
17 conclusion that this record demonstrates conservative treatment is not supported by  
18 substantial evidence. Because the record reflects that Plaintiff's bilateral knee  
19 condition was painful and caused swelling, requiring Plaintiff to elevate her feet  
20 and use a cane for stability, Plaintiff's choice to supplement her prescribed narcotic

1 pain medicine with non-narcotic pain relief was not a legitimate and specific  
2 reason, on this record, to discount Dr. Alpern's attendance opinion. *Cf. Trevizo v.*  
3 *Berryhill*, 871 F.3d 664, 680 n.8 (9th Cir. 2017) (recognizing it is inappropriate to  
4 discount a claimant's symptom testimony because she declined to take prescribed  
5 narcotics because she feared addiction and took other medication that addressed  
6 her pain).

7 In sum, the ALJ failed to provide specific and legitimate reasons to reject  
8 Dr. Alpern's opinions.

9 *2. Dr. Ritchey*

10 From about 2013 to 2016, Dr. Ritchey was Plaintiff's primary care  
11 physician. *See, e.g.*, Tr. 350-63, 373-79, 382-88, 481, 510-11, 523-23, 541-42,  
12 550-55. In December 2016, Dr. Ritchey diagnosed Plaintiff with degenerative  
13 arthritis of the knees. Tr. 481-83. He opined that Plaintiff could walk one block or  
14 less, sit for thirty minutes at one time, stand for ten minutes at one time, sit and  
15 stand/walk each for less than two hours total in an eight-hour workday; required a  
16 job that permitted shifting from sitting to standing to walking; needed to walk  
17 around every fifteen minutes for ten minutes each time; and needed several breaks  
18 during the workday because of her pain. Tr. 482. Dr. Ritchey further opined that  
19 Plaintiff's legs should be elevated stool high and noted that elevation temporarily  
20 provides relief but then makes Plaintiff's pain worse; she cannot twist, crouch,

1 squat, or climb stairs or ladders and should rarely stoop or bend; she should never  
2 lift more than twenty pounds and should rarely lift items that weigh less; she had  
3 no manipulative limitations and could reach overhead; she would be off task  
4 twenty-five percent or more of the workday because her pain would interfere with  
5 her attention and concentration; and that she would be absent more than four days  
6 per month because of her symptoms. Tr. 483-84.

7 The ALJ assigned Dr. Ritchey's opinion little weight. Tr. 25. Because Dr.  
8 Ritchey's opinion was contradicted by the nonexamining opinions of Dr. O'Brien,  
9 Tr. 84-86, and Dr. Hale, 96-98, the ALJ was required to provide specific and  
10 legitimate reasons for rejecting Dr. Ritchey's opinion. *See Bayliss*, 427 F.3d at  
11 1216.

12 First, the ALJ discounted Dr. Ritchey's opinion because he treated Plaintiff  
13 only three to four times a year. Tr. 25. The number of times a claimant meets  
14 with a provider is a relevant factor in assigning weight to an opinion. 20 C.F.R.  
15 §§ 404.1527(c), 416.927(c). Additionally, the extent to which a medical source is  
16 "familiar with the other information in [the claimant's] case record" is relevant in  
17 assessing the weight of that source's medical opinion. 20 C.F.R. §§ 404.1527(c),  
18 416.927(c). Moreover, the ALJ "may consider an acceptable medical source who  
19 has treated or evaluated [a claimant] only a few times or only after long intervals  
20

1 (e.g., twice a year) to be your treating source if the nature and frequency of the  
2 treatment or evaluation is typical for [the claimant's] condition(s)." 20 C.F.R. §§  
3 404.1527(a)(2), 416.927(c). The record reflects that Dr. Ritchey examined  
4 Plaintiff on at least four occasions in 2015, Tr. 350-57, 373-79, 510-11, and at  
5 least five occasions in 2016, Tr. 523-24, 541-42, 550, 553, 555-56. Moreover, in  
6 addition to his own observations, Dr. Richey reviewed reports prepared by  
7 specialists, *see, e.g.*, Tr. 555 (noting that the Northwest Orthopedics notes were in  
8 his file). Given that the ALJ gave great weight to the one-time, largely  
9 unexplained evaluation opinion of Dr. Lein, Tr. 413-15, and the nonexamining  
10 opinions of Dr. Hale and Dr. O'Brien, Tr. 84-86, 96-98, the fact that Dr. Richey  
11 treated Plaintiff three to four times a year is not a specific and legitimate reason to  
12 discount his opinion.

13       Second, the ALJ discounted Dr. Ritchey's opinion because there was no  
14 significant or meaningful treatment. Tr. 25. An ALJ may give less weight to a  
15 medical opinion that recommends conservative treatment. *Rollins*, 261 F.3d at  
16 856. "Any evaluation of the aggressiveness of a treatment regimen must take into  
17 account the condition being treated." *Revels v. Berryhill*, 874 F.3d 648, 667 (9th  
18 Cir. 2017); *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (casting doubt  
19 on characterizing epidural injections and physical therapy as conservative  
20 treatment). Here, Defendant submits that Plaintiff is merely asking the Court to

1 reach a different interpretation of the evidence than reached by the ALJ. ECF No.  
2 13 at 16. However, the ALJ did not discuss the nature and scope of Dr. Ritchey's  
3 treatment of Plaintiff, other than stating Plaintiff "was given some hydrocodone for  
4 nighttime use and could use plain Tylenol during the day . . . [and to] follow up on  
5 an as-needed basis," Tr. 23, nor identified how it was insignificant or  
6 unmeaningful. In fact, the record reflects that, in addition to prescribing  
7 hydrocodone, discussing the addictive nature of hydrocodone, and having her  
8 follow-up with him as needed, Dr. Ritchey authorized an MRI and an injection for  
9 Plaintiff's left shoulder, Tr. 361-63; referred Plaintiff to Northwest Orthopaedic  
10 Specialists for her bilateral knee and left shoulder pain, *see, e.g.*, Tr. 391; and was  
11 apprised of Plaintiff's treatment, including surgery, by Northwest Orthopaedic  
12 Specialists, Tr. 382-96, 424-25. Lacking sufficient analysis of the treatment that  
13 occurred, the ALJ's decision to discount Dr. Ritchey's opinion because there was  
14 no significant treatment is not a legitimate or specific reason supported by  
15 substantial evidence on this record.

16 Third, the ALJ discounted Dr. Ritchey's opinion because there were no  
17 clinical findings consistent with Dr. Ritchey's assessment. Tr. 25. A medical  
18 opinion may be rejected if it is unsupported by medical findings. *Bray*, 554 F.3d at  
19 1228; *Batson*, 359 F.3d at 1195; *Thomas*, 278 F.3d at 957. Furthermore, a  
20 physician's opinion may be rejected if it is unsupported by the physician's

1 treatment notes. *Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003). Here, the  
2 ALJ neither identified the clinical findings that were inconsistent with Dr.  
3 Ritchey's functional capacity assessment nor explained why Dr. Ritchey's notation  
4 that Plaintiff's impairments "as demonstrated by signs, clinical findings and  
5 laboratory or test results" were "reasonably consistent with the symptoms and  
6 functional limitations described" was unsupported. Tr. 25, 484. Without the ALJ  
7 offering more than his stated conclusion, the Court is unable to meaningfully  
8 review whether the ALJ's interpretation of the evidence, rather than Dr. Ritchey's  
9 opinion, is rational. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir.  
10 2015); *Embrey*, 849 F.2d at 421-22 (requiring the ALJ to identify the evidence  
11 supporting the found conflict to permit the Court to meaningfully review the ALJ's  
12 finding). Moreover, in addition to reviewing the orthopedic clinic notes, Tr. 382-  
13 96, 424-25, and the December 2015 bilateral x-ray of the knees, which showed  
14 joint space narrowing in the medial compartments in both knees with small  
15 osteophytes along the margins of the bilateral joints, Tr. 499-500, the record  
16 reflects that Dr. Ritchey observed Plaintiff on different occasions over a two-year  
17 period with abnormal symptoms, including walking with an antalgic gait with  
18 likely minimal effusion and tenderness in the medial and inferior patellar areas of  
19 the knee, Tr. 356; walking with a cane and an antalgic gait with tenderness over the  
20 lateral aspect of the right knee and a diffusely tender left knee, Tr. 374; using a

1 cane and with medial joint line tenderness on both knees, Tr. 510; walking with a  
2 cane and an antalgic gait with mild bilateral degenerative knee joint disease, Tr.  
3 541-42; walking with a slight antalgic gait, Tr. 553; and walking with a cane with a  
4 somewhat antalgic gait and subtle effusion of the left knee compared to the right  
5 knee, Tr. 556. The ALJ failed to identify why on this record Dr. Richey's treating  
6 opinion about Plaintiff's degenerative bilateral knee condition was given less  
7 weight than the non-examining physicians' opinions.

8 In summary, the ALJ did not offer specific and legitimate reasons supported  
9 by substantial evidence for discounting Dr. Ritchey's treating opinion.

10 *3. Dr. Lein*

11 In September 2015, Dr. Lein evaluated Plaintiff for State Department of  
12 Social and Health Services purposes. Tr. 413-18. No diagnosis was listed, but Dr.  
13 Lein listed that an x-ray of Plaintiff's left knee showed early osteoarthritic change  
14 of the left pellofemoral joint space, Plaintiff had meniscal repair in 2012 and  
15 debridement in 2013 of the left knee, and she had arthroscopic surgery of her right  
16 knee in 2002. Tr. 414-15. Dr. Lein opined that Plaintiff was limited to light work,  
17 which was identified on the form as "able to lift [twenty] pounds maximum and  
18 frequently lift or carry up to [ten] pounds, able to walk or stand six out of eight  
19 hours per day, and able to sit and use pushing or pulling arm or leg movements  
20 most of the day." Tr. 415. Dr. Lein opined that Plaintiff's work limitations would



1 persist for five months and that Plaintiff needed to have orthopedic surgery on her  
2 shoulder and physical therapy on her knee. Tr. 415.

3 The ALJ assigned varying weight to Dr. Lein's opinion. Tr. 25. Because  
4 Dr. Lein's opinion was contradicted by Dr. Ritchey's opinion, Tr. 481-83, the ALJ  
5 was required to provide specific and legitimate reasons for both crediting and  
6 discounting Dr. Lein's opinion. *See Bayliss*, 427 F.3d at 1216 *Garrison*, 759 F.3d  
7 at 1012-13; *Lester*, 81 F.3d at 831.

8 The ALJ afforded some weight to Dr. Lein's opinion because it confirmed  
9 that Plaintiff could perform light level work and therefore was not disabled. Tr.  
10 25. An ALJ may choose to give more weight to an opinion that is more consistent  
11 with the evidence in the record. 20 C.F.R. § 416.927(c)(4); *Nguyen*, 100 F.3d at  
12 1464. Relevant factors when evaluating a medical opinion include the amount of  
13 relevant evidence that supports the opinion, the quality of the explanation provided  
14 in the opinion, and the consistency of the medical opinion with the record as a  
15 whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. Here, the ALJ  
16 simply stated that Dr. Lein's light level residual functional capacity "confirms that  
17 [Plaintiff] is not disabled." Tr. 25. This conclusory statement fails to meet the  
18 ALJ's burden of "setting out a detailed and thorough summary of the facts and  
19 conflicting clinical evidence, stating his interpretation thereof, and making  
20 findings." *Trevizo*, 871 F.3d at 675 (internal citations omitted). The ALJ failed to

1 explain why Dr. Lein's opinion, which was only supported by reference to undated  
2 x-rays of Plaintiff's left knee (early osteo arthritic change of the left patellofemoral  
3 joint space), right knee (negative), lumbar spine (negative), and left shoulder  
4 (negative), Tr. 414, and a chart reflecting that Plaintiff's range of motion was  
5 limited in both knees, Tr. 417-18, supports a finding that Plaintiff is not disabled,  
6 considering the other medical evidence. Moreover, the more recent medical  
7 records revealed bilateral degenerative joint disease of the knees, Tr. 499, 567-68,  
8 and that Plaintiff still had acromioclavicular joint arthritis, impingement syndrome  
9 (separate compartment), and partial thickness rotator cuff tear and tendinosis  
10 (separate compartment) after her left shoulder surgery, Tr. 424. On this record, the  
11 ALJ's decision to afford weight to Dr. Lein's opinion that Plaintiff is not disabled  
12 is not supported by a legitimate and specific reason.

13 *4. Dr. Rogge*

14 In April 2014, orthopedic surgeon Dr. Rogge conducted an independent  
15 medical examination of Plaintiff for the State Department of Labor and Industries  
16 and diagnosed her with a left-knee tear of the medial and lateral meniscus (status  
17 post-partial medial and lateral meniscectomy) and pre-existing degenerative  
18 arthritis of the left knee, which was permanently aggravated by the former  
19 condition. Tr. 305-10. Dr. Rogge opined that Plaintiff had too much pain to work  
20 at her job of injury and recommended that Plaintiff have a total knee replacement

1 and then return for an impairment rating. Tr. 311. Dr. Rogge opined that, “[w]ith  
2 a wheelchair, [Plaintiff] could work at a light duty job, but I do not think this is  
3 practical”; that she could sit for two hours at a time and stand or walk for one-half  
4 hour each at a time. Tr. 313-15. He opined that Plaintiff could not use her left foot  
5 to operate foot controls but could use her right foot to operate foot controls. Tr.  
6 315. Dr. Rogge opined that Plaintiff could grasp, push, pull, and manipulate with  
7 her arms; could frequently bend and reach above her shoulder level, and could not  
8 squat, kneel, crawl, or climb. Tr. 315.

9 The ALJ rejected Dr. Rogge’s opinion that Plaintiff needed to use a  
10 wheelchair at work and assigned partial or limited weight to the remainder of Dr.  
11 Rogge’s opinion. Tr. 24. Because Dr. Rogge’s opinion was contradicted by the  
12 nonexamining opinions of Dr. O’Brien, Tr. 84-86, and Dr. Hale, 96-98, the ALJ  
13 was required to provide specific and legitimate reasons for rejecting Dr. Rogge’s  
14 opinion. *See Bayliss*, 427 F.3d at 1216.

15 First, the ALJ discounted Dr. Rogge’s opinion because it had an  
16 exceptionally limited nature. Tr. 24. Factors to evaluating a medical opinion  
17 include the amount of relevant evidence that supports the opinion, the quality of  
18 the explanation provided in the opinion, and the consistency of the medical opinion  
19 with the record. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. Here, the  
20 ALJ did not explain what he meant by “the exceptionally limited nature of [Dr.

1 Rogge's] assessment," Tr. 24. It is unclear whether the ALJ was referring to the  
2 fact that Dr. Rogge met with Plaintiff on one occasion, to the scope of the  
3 evaluation, or the scope of written opinion. On this record, without additional  
4 explanation or a citation to the record, this was not a specific and legitimate reason  
5 to discount Dr. Rogge's opinion. *See Thomas*, 278 F.3d at 957 (recognizing the  
6 ALJ's duty to set out a detailed and thorough summary of the facts and conflicting  
7 clinical evidence, interpret that evidence, and make specific findings); *Embrey v.*  
8 *Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

9       Second, the ALJ discounted Dr. Rogge's opinion as equivocal. Tr. 24. An  
10 ALJ may reject a medical opinion if it is conclusory, inadequately supported, or  
11 not supported by the record. *Bray*, 554 F.3d at 1228; *Thomas*, 278 F.3d at 957.  
12 Here, the ALJ noted that Dr. Rogge's checkmark assessment was somewhat  
13 difficult to decipher and appeared to suggest that Plaintiff could perform a full  
14 range of light work. Tr. 24. While Dr. Rogge marked that Plaintiff could sit,  
15 stand, and walk for eight hours in a workday and stated that Plaintiff could do a  
16 "light duty job" while in a wheelchair, Dr. Rogge also marked that Plaintiff was  
17 limited to sitting two hours at a time and was unable to sit or walk for more than a  
18 half-hour at a time. Tr. 313-15. As the ALJ identified, there are inconsistencies in  
19 Dr. Rogge's report. However, when Dr. Rogge's opinion is read in its entirety, it  
20 is clear that Dr. Rogge considered Plaintiff severely limited. *See Holohan*, 246

1 F.3d at 1205 (requiring the ALJ to read an opinion in full and in the context of the  
2 entire record). Dr. Rogge found “an increase in objective medical findings,  
3 effusion in the [left] knee, and tricompartmental arthritis on an MRI,” Tr. 313. Dr.  
4 Rogge found that osteoarthritis was delaying Plaintiff’s recovery and causing the  
5 knee condition to become worse as she had knee effusion and limited motion in the  
6 knee. Here, the ALJ needed to review the entirety of Dr. Rogge’s opinion to  
7 appreciate that Dr. Rogge’s phrase “light duty job” was not synonymous with  
8 “light work” as defined by the Social Security Administration:

9 involving lifting no more than 20 pounds at a time with frequent  
10 lifting or carrying of objects weighing up to 10 pounds. Even though  
11 the weight lifted may be very little, a job is in this category when it  
12 requires a good deal of walking or standing, or when it involves  
sitting most of the time with some pushing and pulling of arm or leg  
controls. To be considered capable of performing a full or wide range  
of light work, you must have the ability to do substantially all of these  
activities.

13 20 C.F.R. §§ 416.917, 404.1567. An “adjudicator[] must not assume that a  
14 medical source using terms such as ‘sedentary’ and ‘light’ is aware of our  
15 definitions of these terms.” SSR 96-5p (eff. until March 27, 2017). Because Dr.  
16 Rogge opined that Plaintiff could only seldom lift objects weighing eleven to  
17 twenty pounds, could not operate foot controls with her left foot, was limited to  
18 sitting two hours at a time, and was limited to sitting and standing only a half-hour  
19 at a time, the ALJ erred by finding that Dr. Rogge’s reference to “light duty job”  
20 indicated that Plaintiff could work “light work” as defined by the Social Security

1 Administration, particularly because Dr. Rogge’s light-duty statement was  
2 predicated by Plaintiff’s use of a wheelchair. *See Orteza v. Shalala*, 50 F.3d 748,  
3 750 (9th Cir. 1995) (finding that there was no evidence that the physician was  
4 aware of the SSA’s definition of “sedentary work”). While the ALJ crafted an  
5 RFC that limited Plaintiff to sedentary work, rather than light work, the ALJ’s  
6 errors regarding Dr. Rogge’s opinion caused the ALJ to evaluate Dr. Rogge’s  
7 opinion—and the entire record—under the mistaken understanding that Dr. Rogge  
8 opined that Plaintiff was capable of light work and thereby deemed it to be  
9 equivocal. *See, e.g., Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004)  
10 (remanding the case because the ALJ erred in discounting the opinions of the  
11 claimant’s treating physician based on the ALJ’s misunderstanding of the  
12 claimant’s condition).

13 Finally, the ALJ rejected Dr. Rogge’s opinion that Plaintiff needed to use a  
14 wheelchair as unsupported by the record. Tr. 24. Relevant factors to evaluating  
15 any medical opinion include the amount of relevant evidence that supports the  
16 opinion and the consistency of the medical opinion with the record. *Lingenfelter*,  
17 504 F.3d at 1042; *Orn*, 495 F.3d at 631. Here, the ALJ did not explain why Dr.  
18 Rogge’s suggestion that Plaintiff work an eight-hour workday in a wheelchair was  
19 “entirely unsupported” considering Dr. Rogge’s observations, which included  
20 observing Plaintiff walk with a very antalgic gait with the use of a cane, effusion in

1 the left knee, pain along the medial and lateral joint lines and pain beneath the  
2 patella. Moreover, the medical record revealed pre-existing and aggravated  
3 tricompartmental osteoarthritis of the left knee, Tr. 309-13, and as is discussed  
4 *infra* and *supra*, all treating physicians and two examining physicians opined that  
5 Plaintiff was unable to stand or sit for more than two hours in a day. It is unclear  
6 on this record why Plaintiff needing to use a wheelchair at work is entirely  
7 unsupported.

8       5. Dr. Park

9       In 2013 and 2014, Dr. Park treated Plaintiff. *See, e.g.*, Tr. 316-20, 326, 328,  
10 335. On August 2, 2014, Dr. Park diagnosed Plaintiff with a torn medial meniscus,  
11 degenerative changes, and exacerbation of chronic pain in the left knee. Tr. 316.  
12 Dr. Park opined that “it does seem reasonable that she should be able to perform a  
13 sitting only job in a wheelchair for [four] hours per day. The issue is her ability to  
14 drive and ambulate to and from her vehicle into a job site.” Tr. 317. Dr. Park then  
15 stated that he would refill her pain medication and complete necessary paperwork  
16 to allow Plaintiff “to prepare for her light-duty job as it does seem she has at least  
17 some worsening of symptoms in the last 1-2 weeks.” Tr. 317.

18       The ALJ assigned Dr. Park’s opinion partial or little weight. Tr. 25.  
19 Because Dr. Park’s opinion was contradicted by the nonexamining opinions of Dr.  
20 O’Brien, Tr. 84-86, and Dr. Hale, 96-98, the ALJ was required to provide specific

1 and legitimate reasons for discounting Dr. Park's opinion. *See Bayliss*, 427 F.3d at  
2 1216.

3 First, the ALJ discounted Dr. Park's opinion because it was phrased as an  
4 opinion on the least Plaintiff could do, not the most she could do. Tr. 25.

5 "Medical opinions are statements from acceptable medical sources that reflect  
6 judgments about the nature and severity of [the claimant's] impairments,

7 including . . . symptoms, diagnosis and prognosis, what [the claimant] can still do  
8 despite impairment(s), and [the claimant's] physical or mental restrictions." 20

9 C.F.R. §§ 416.917(a)(1), 404.1527(a)(1). In deciding how much weight to give to

10 a medical opinion, the ALJ may consider the physician's understanding of the

11 disability programs and the extent to which the medical source is familiar with the

12 claimant's medical record. 20 C.F.R. §§ 416.917(c)(6), 404.1527(c)(6). Here,

13 citing to SSR 96-8p, which states that an "RFC is not the *least* an individual can do

14 despite his or her limitations or restrictions, but the *most*," Defendant argues the

15 ALJ appropriately discounted Dr. Park's opinion because it was phrased as an

16 opinion on the least Plaintiff could do. However, the ALJ provided no explanation

17 for, nor is there a basis in the record, to support the ALJ's conclusion that Dr. Park

18 opined as to the least that Plaintiff could do. Without supporting analysis, the

19 ALJ's decision to discount Dr. Park's opinion on the grounds that it was phrased as  
20



1 an opinion on the least Plaintiff could do, not the most she could do, is not a  
2 legitimate and specific reason on this record.

3 Second, the ALJ discounted Dr. Park's opinion that Plaintiff was limited to a  
4 wheelchair because it was inconsistent with the record. Tr. 25. An ALJ may  
5 discount a medical opinion that is unsupported by the clinical findings and is  
6 inconsistent with the record. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631.  
7 Here, the ALJ did not articulate how Dr. Park's opinion limiting Plaintiff to  
8 working in a wheelchair is inconsistent with the record. *See Brown-Hunter*, 806  
9 F.3d at 492; *Embrey*, 849 F.2d at 421-22. Moreover, as discussed *supra*, Dr.  
10 Rogge opined that Plaintiff could work in a wheelchair. Tr. 313. The record also  
11 reflects that when Plaintiff was released to modified work for a short period of  
12 time following her acute left knee injury and surgery, Plaintiff worked in a  
13 wheelchair. Tr. 319. Accordingly, without explanation, the ALJ's decision to  
14 discount Dr. Park's wheelchair opinion on the grounds that it was inconsistent with  
15 the record is not a specific and legitimate reason on this record.

16 Third, the ALJ discounted Dr. Park's opinion because it was internally  
17 inconsistent. Tr. 25. An ALJ may reject opinions that are internally inconsistent.  
18 *Nguyen*, 100 F.3d at 1464. An ALJ is not obliged to credit medical opinions that  
19 are unsupported by the medical source's own data. *Tommasetti v. Astrue*, 533 F.3d  
20 1035, 1041 (9th Cir. 2008). Here, the ALJ found Dr. Park's opinion to be

1 internally inconsistent because Dr. Park indicated that Plaintiff could do both a  
2 “sitting-only” job and a “light-duty” job. Tr. 25. Plaintiff argues the ALJ erred by  
3 assuming that Dr. Park intended the phrase “light-duty job” to be interpreted  
4 consistent with the Social Security Administration’s definition of light work. ECF  
5 No. 12 at 13 (citing SSR 96-5p, 20 C.F.R. §§ 416.917, 404.1567). As discussed  
6 *supra*, an ALJ may not assume that a medical source using terms such as “light  
7 work” is aware of the Administration’s definition of this term. SSR 96-5p (eff.  
8 until March 27, 2017). When Dr. Park’s opinion is read in its entirety and in its  
9 context, it is not clear that Dr. Park used the phrase “light-duty job” consistent with  
10 the Administration’s definition of “light work.” *See Orteza*, 50 F.3d at 750. Dr.  
11 Park’s work comments were in relation to Plaintiff’s State Labor and Industries  
12 proceeding. Tr. 317. Moreover, Dr. Park’s reference to the light-duty job  
13 followed his discussion that Plaintiff could perform a sitting-only job in a  
14 wheelchair for four hours per day and that she would have difficulty driving and  
15 ambulating to and from her vehicle to the job site. On this record, the ALJ’s  
16 finding that Dr. Park opined that Plaintiff could perform “light work” as defined by  
17 the Social Security Administration is unsupported.

18 While the ALJ ultimately crafted an RFC that limited Plaintiff to sedentary  
19 work, rather than light work, the ALJ’s errors regarding Dr. Park’s opinion caused  
20 the ALJ to evaluate the entire record under the mistaken understanding that Dr.

1 Park opined that Plaintiff was capable of light work. *See Benecke*, 379 F.3d at 594.  
2 Moreover, the ALJ failed to discuss Dr. Park's four-hour work limitation, which is  
3 inconsistent with an ability to work on a sustained basis, and therefore would result  
4 in Plaintiff being considered disabled. *See* SSR 96-8p.

5 Defendant argues that any error as to the ALJ's treatment of Dr. Park's  
6 opinion is harmless because the ALJ was not required to address Dr. Park's  
7 conclusory opinion as it was not a medical opinion but instead an opinion on an  
8 issue reserved to the Commissioner. ECF No. 13 at 14. This argument is not  
9 persuasive because Dr. Parks did not opine that Plaintiff was "disabled." Rather,  
10 Dr. Park opined that Plaintiff was limited to a sitting job in a wheelchair for four  
11 hours per day. The ALJ was to consider this opinion, in its entirety, compare it  
12 with the remaining record, and provide sufficient analysis so that the Court could  
13 meaningfully review the ALJ's decision to discount Dr. Park's opinion. *See Bray*,  
14 554 F.3d at 1228; *Thomas*, 278 F.3d at 957; *Embrey*, 849 F.2d at 421-22. Lacking  
15 sufficient analysis, the ALJ's decision to discount Dr. Park's opinion is not  
16 supported by a specific and legitimate reason.

17 *6. Dr. Green and Dr. Miller*

18 In July 2013, Dr. Green, an orthopedic surgeon, examined Plaintiff's left  
19 knee for State Labor and Industries purposes. Tr. 289-300. Dr. Green diagnosed  
20 Plaintiff with internal derangement of the left knee with tear of the menisci and

1 chondromalacia, noting that Plaintiff was status-post two medial and lateral partial  
2 meniscectomies to the left knee. Tr. 293. Dr. Green ordered an MRI of Plaintiff's  
3 left knee. Tr. 294. After reviewing the left knee MRI,<sup>1</sup> Dr. Green opined that  
4 Plaintiff's acute-knee injury was fixed and stable. Dr. Green opined that Plaintiff:

- 5 • was limited to sitting, standing, and walking 1) one hour each at a  
6 time, and 2) one hour each during an eight-hour work day;
- 7 • could only occasionally lift 21-25 pounds, seldom lift 26-50 pounds,  
8 and never lift more than 51 pounds;
- 9 • had no restrictions with either her left or right hand;
- 10 • could frequently reach above her shoulders;
- 11 • could use her right foot but not her left foot for operating foot  
12 controls; and
- 13 • could seldomly bend, squat, kneel, crawl, or climb.

14 Tr. 296.

---

18 <sup>1</sup> Dr. Green mistakenly referred twice to Plaintiff's right knee instead of her left  
19 knee in his report. Tr. 290.

1 On July 26 and 30, 2013, Plaintiff's treating physician Dr. Miller completed  
2 a form for State Department of Labor and Industries on which he checked a box  
3 indicating he concurred with Dr. Green's opinion. Tr. 301, 303.

4 The ALJ assigned great weight to Dr. Green's and Dr. Miller's opinions. Tr.  
5 24. An ALJ must set forth specific, legitimate reasons for crediting one medical  
6 opinion over a conflicting opinion. *Garrison*, 759 F.3d at 1012-13.

7 First, the ALJ gave great weight to Dr. Green's opinion because he is an  
8 orthopedic surgeon. A medical provider's specialization is a relevant consideration  
9 in weighing medical opinion evidence. 20 C.F.R. §§ 404.1527(c)(5),  
10 416.927(c)(5). This was a supported reason to give greater weight to Dr. Green's  
11 opinion.

12 Second, the ALJ gave great weight to this opinion because it was agreed-  
13 upon by both Dr. Green and Dr. Miller. Tr. 24. An ALJ may choose to give more  
14 weight to an opinion that is more consistent with the record. 20 C.F.R. §  
15 416.927(c)(4); *Nguyen*, 100 F.3d at 1464; *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495  
16 F.3d at 631. Here, the ALJ found that Dr. Miller's adoption of Dr. Green's  
17 evaluation was compelling evidence that Plaintiff was not disabled. Tr. 24. While  
18 consistency with the record is a relevant factor, as is discussed *infra*, the ALJ failed  
19 to appreciate that Dr. Green opined that Plaintiff had sitting, standing, and walking  
20

1 limitations—and that Dr. Miller also agreed that Plaintiff had sitting, standing, and  
2 walking limitations.

3 Finally, the ALJ gave great weight to these opinions on the grounds that they  
4 were adequately supported. Tr. 24. Relevant factors to evaluating any medical  
5 opinion include the amount of evidence that supports the opinion, the quality of the  
6 explanation provided in the opinion, and the consistency of the medical opinion  
7 with the record. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. An ALJ  
8 may choose to give more weight to an opinion that is more consistent with the  
9 evidence in the record. 20 C.F.R. § 416.927(c)(4). Here, the ALJ noted that Dr.  
10 Green conducted a thorough physical exam and review of the records, which  
11 included Plaintiff’s July 2013 MRI. Tr. 24. These are legitimate reasons for  
12 giving great weight to these opinions. However, the ALJ also recognized that there  
13 “appeared to be some mis-markings on the checkmark form such as indications the  
14 [Plaintiff] could stand/walk for one hour at a time.” Tr. 24. Notwithstanding these  
15 “mis-markings,” the ALJ found that the “clear intent of [Dr. Green’s] assessment  
16 was that [Plaintiff] could perform between light and medium level work with only  
17 some minor postural limitations” and therefore the ALJ effectively discounted Dr.  
18 Green’s assessment that Plaintiff could stand, walk, or sit for only one hour at a  
19 time. Tr. 24, 296. Without a more meaningful discussion of the evidence to  
20 support the ALJ’s finding, the Court is unable to assess whether the ALJ’s decision

1 to interpret Dr. Green’s opinion as supporting the ability to perform light and  
2 medium level work is supported by substantial evidence. The ALJ apparently  
3 found it inconsistent for Dr. Green to opine that Plaintiff was limited to sitting,  
4 standing, or walking each one hour at a time and then also impose this same one-  
5 hour limitation for the eight-hour work day. But the ALJ failed to discuss that Dr.  
6 Green rated Plaintiff as ten-percent impaired under Table 17-33 of the American  
7 Medical Association Guides to the Evaluation of Permanent Impairment. Tr. 295.  
8 Such a rating results in Plaintiff qualifying as Class 2 in Table 13-15: “rises to  
9 standing position; walks some distance with difficulty and without assistance, but  
10 is limited to level surfaces.” The ALJ failed to explain how a Class 2 finding is  
11 inconsistent with Dr. Green’s sitting, standing, and walking limitations and  
12 moreover how these limitations are consistent with the ALJ’s finding that Dr.  
13 Green’s “clear intent of his assessment was that [Plaintiff] could perform between  
14 light and medium level work with only some minor postural limitations.” Tr. 24.  
15 Moreover, Dr. Green observed Plaintiff with a slightly left antalgic gait,  
16 questionable instability related to balancing, difficulty ambulating on her heels,  
17 and with a left knee that incompletely extended and with impacted range of  
18 motion. Tr. 292. The ALJ’s inference that Dr. Green opined that Plaintiff could  
19 perform light and medium level work is not supported by the medical findings or  
20 the record. *See Garrison*, 759 F.3d at 1014 (deciding that the ALJ misunderstood

1 the medical report when determining that it supported a finding that the claimant  
2 was capable of light work and therefore not disabled); *Widmark v. Barnhart*, 454  
3 F.3d 1063, 1068 (9th Cir. 2006). Thus, while the ALJ stated that he gave great  
4 weight to Dr. Green's opinion, he gave great weight to the misinterpreted opinion  
5 that Plaintiff could perform light or medium level work, rather than to Dr. Green's  
6 opinion that Plaintiff was limited to sitting, standing, and walking each for one  
7 hour—an opinion that was largely consistent with Dr. Ritchey's more recent  
8 December 2016 opinion that Plaintiff could sit and stand/walk for less than two  
9 hours in an eight-hour work day. Moreover, even Dr. Alpern testified that due to  
10 Plaintiff's painful bilateral knee condition and left shoulder condition, Plaintiff  
11 would need to elevate her feet even if she performed a sedentary job and that she  
12 would be absent more than two days a month because of pain. Tr. 482.

13 Defendant submits the ALJ properly discounted Dr. Green's one-hour limit  
14 for sitting, standing, and walking because an ALJ may discount a check-the-box  
15 assessment. ECF No. 13 at 11 (citing *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir.  
16 1996)). However, Dr. Green's opinion included more than his check-the-box  
17 assessment; it was accompanied by his seven-page report. Tr. 289-96. Therefore,  
18 the ALJ could not properly discount Dr. Green's assessment because it was set  
19 forth on a check-the-box form without further analysis. *See Trevizo*, 871 F.3d at  
20 667 n.4. Moreover, this was not a reason (use of a conclusory check-the-box form)



1 identified by the ALJ to discount Dr. Green's opinion. *See Orn*, 495 F.3d at 630  
2 (recognizing the court's review is limited to only reasons provided by the ALJ to  
3 discount a medical opinion).

4 In summary, the ALJ erroneously interpreted Dr. Green's and Dr. Miller's  
5 opinions as not being as limited as opined.

6 *7. Dr. O'Brien and Dr. Hale*

7 Both Dr. O'Brien and Dr. Hale served as State agency medical consultants.  
8 On March 3, 2015, Dr. O'Brien reviewed the medical evidence then of record. Tr.  
9 81-82. Dr. O'Brien diagnosed Plaintiff with reconstructive surgery of weight  
10 bearing joint, and osteoarthritis and allied disorders. Tr. 83. On August 4, 2015,  
11 Dr. Hale reviewed the medical evidence then of record. Tr. 92-94. Dr. Hale  
12 diagnosed Plaintiff with reconstructive surgery of weight bearing joint,  
13 osteoarthritis and allied disorders, and dysfunction of major joints. Tr. 96. Both  
14 Dr. O'Brien and Dr. Hale opined that Plaintiff could stand and/or walk for four  
15 hours; sit for six hours; occasionally lift and carry twenty pounds; frequently lift or  
16 carry ten pounds; occasionally crawl and climb ramps or stairs; never climb  
17 ladders, ropes, or scaffolds; and frequently kneel and crouch. Tr. 84-85, 97. They  
18 both opined that Plaintiff did not have manipulative limitations. Tr. 85, 97.

19 The ALJ assigned Dr. O'Brien's and Dr. Hale's opinions great weight. Tr.  
20 23. Because Dr. O'Brien's and Dr. Hale's opinions were contradicted by Dr.

1 Ritchey's opinion, Tr. 481-83, the ALJ was required to provide specific and  
2 legitimate reasons for crediting Dr. O'Brien's and Dr. Hale's opinions. *See*  
3 *Bayliss*, 427 F.3d at 1216; *Garrison*, 759 F.3d at 1012-13.

4       The ALJ assigned great weight to Dr. O'Brien's and Dr. Hale's opinions  
5 because they were based on the medical evidence. Relevant factors to evaluating  
6 any medical opinion include the amount of relevant evidence that supports the  
7 opinion and the consistency of the medical opinion with the record. *Lingenfelter*,  
8 504 F.3d at 1042; *Orn*, 495 F.3d at 631. Here, the ALJ simply offered a  
9 conclusory statement that Dr. O'Brien's and Dr. Hale's opinions "are reasonable  
10 opinions based on the medical evidence." Tr. 23. This conclusory statement fails  
11 to meet the ALJ's burden of "setting out a detailed and thorough summary of the  
12 facts and conflicting clinical evidence, stating his interpretation thereof, and  
13 making findings." *Trevizo*, 871 F.3d at 675 (internal citations omitted). The ALJ  
14 fails to explain why Dr. O'Brien's and Dr. Hale's opinions, which were largely  
15 devoid of any explanation other than stating that "pain is considered in [the] RFC,"  
16 Tr. 85, 98, and summarizing the reviewed medical records, Tr. 86, 95, were  
17 consistent with the longitudinal medical evidence. Moreover, as discussed *supra*,  
18 following Dr. O'Brien's and Dr. Hale's 2015 opinions, Plaintiff's degenerative  
19 knee conditions continued to deteriorate, consistent with Dr. Rogge's finding that  
20 Plaintiff's left knee osteoarthritis was permanently aggravated by the 2011 work

1 injury and retarded recovery, Tr. 312, and as is reflected in the more recent medical  
2 evidence and the opinion Dr. Ritchey. Considering the other medical evidence, the  
3 ALJ failed to provide specific, legitimate reasons for crediting Dr. O'Brien's and  
4 Dr. Hale's nonexamining opinions.

5 Yet, the ALJ proceeded to find, based on Plaintiff's testimony, the other  
6 medical opinions, and indications that Plaintiff needs to use a cane to ambulate,  
7 that Plaintiff was more limited than as opined by Dr. O'Brien and Dr. Hale. Tr. 23.  
8 Thus, even though the ALJ gave great weight to Dr. O'Brien's and Dr. Hale's  
9 opinions, the ALJ discounted the opinions considering the other medical evidence.  
10 This discounting is supported by substantial evidence. However, as is discussed  
11 *infra*, the ALJ's sedentary RFC is not consistent with the medical evidence that  
12 must be credited-as-true.

13 In summary, the ALJ erroneously weighed the medical evidence. This error  
14 is consequential as the ALJ failed to credit Dr. Alpern's opinion about Plaintiff's  
15 listing status and, at a minimum, the sedentary RFC does not call for 1) rotating  
16 between sitting, standing, or walking, or more-restrictive time intervals for these  
17 functions, and 2) the need for non-standard breaks or unproductive time. *See*  
18 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008).

1       **B. Step Three**

2       Plaintiff contends the ALJ erred by finding that Plaintiff did not meet Listing  
3 1.02. ECF No. 12 at 6-10. At step three, the ALJ must determine if a claimant's  
4 impairments meet or equal a listed impairment. 20 C.F.R. §§ 404.1520(a)(4)(iii),  
5 416.920(a)(4)(iii). The Listing of Impairments "describes each of the major body  
6 systems impairments [which are considered] severe enough to prevent an  
7 individual from doing any gainful activity, regardless of his or her age, education  
8 or work experience." 20 C.F.R. §§ 404.1525, 416.925. To meet a listed  
9 impairment, a claimant must establish that she meets each characteristic of a listed  
10 impairment relevant to her claim. 20 C.F.R. §§ 404.1525(d), 416.925(d). If a  
11 claimant meets the listed criteria for disability, she will be found to be disabled. 20  
12 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). The ALJ must receive into  
13 evidence during the administrative hearing the opinion of the testifying medical  
14 examiner on the issue of listing equivalence and give appropriate weight to that  
15 opinion. SSR 96-6p (eff. July 2, 1996, to March 27, 2017). The claimant bears the  
16 burden of establishing she meets a listing. *Burch v. Barnhart*, 400 F.3d 676, 683  
17 (9th Cir. 2005).

18       Here, the ALJ found that Plaintiff's impairments and combination of  
19 impairments did not meet or equal any listings, including Listing 1.02, which  
20 governs the major dysfunction of a joint due to any cause. Tr. 19-20; 20 C.F.R. pt.

1 404, subpt. P., app. 1, listing 1.02. Listing 1.02 is satisfied by a gross anatomical  
2 deformity, e.g., subluxation, contracture, bony or fibrous ankylosis, instability, and  
3 chronic joint pain and stiffness with signs of limitation of motion or other  
4 abnormal motion of the affected joint(s). *Id.* There must be findings on  
5 appropriate medically acceptable imaging of joint space narrowing, bony  
6 destruction, or ankylosis of the affected joint(s). *Id.* Paragraph A covers the  
7 involvement of one major peripheral weight-bearing joint, such as a knee, resulting  
8 in the inability to ambulate effectively:

9 [t]o ambulate effectively, individuals must be capable of sustaining a  
10 reasonable walking pace over a sufficient distance to be able to carry  
11 out activities of daily living. They must have the ability to travel  
12 without companion assistance to and from a place of employment or  
13 school. Therefore, examples of ineffective ambulation include, but are  
14 not limited to, the inability to walk without the use of a walker, two  
15 crutches or two canes, the inability to walk a block at a reasonable  
pace on rough or uneven surfaces, the inability to use standard public  
transportation, the inability to carry out routine ambulatory activities,  
such as shopping and banking, and the inability to climb a few steps at  
a reasonable pace with the use of a single hand rail. The ability to  
walk independently about one's home without the use of assistive  
devices does not, in and of itself, constitute effective ambulation.

16 20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.00B(2)(b). Paragraph B covers the  
17 involvement of one major peripheral joint in each upper extremity, i.e., shoulder,  
18 elbow, or wrist-hand), resulting in inability to perform fine and gross movements  
19 effectively. 20 C.F.R. pt. 404, subpt. P., app. 1, listing 1.02. If a claimant has a  
20 combination of impairments, not one of which meets a listing, the Commissioner

1 compares the findings with those for closely analogous listed impairments. Soc.  
2 Sec. Rlg. 17-2p. “If the findings related to the impairments are at least of equal  
3 medical significance to those of a listed impairment,” the combination of  
4 impairments is found to be medically equivalent to that listing. *Id.*

5 Here, the ALJ found that, although Plaintiff has a history of two failed  
6 medial meniscus repair surgeries that resulted in a partial medial meniscectomy,  
7 and a left shoulder rotator cuff repair surgery, Plaintiff can ambulate with a cane  
8 and has no fine or gross manipulation limitations. Tr. 19. The ALJ noted that 1) a  
9 July 2014 MRI of Plaintiff’s left knee revealed that Plaintiff’s left knee condition  
10 was stable to slightly improved from the most recent comparison; 2) imaging in  
11 December 2015 showed only minimal bilateral degenerative joint disease; and 3)  
12 physical therapy records showed that after her left shoulder surgery Plaintiff  
13 recovered with minimal residual findings. Tr. 19-20 (citing Tr. 338-39, 499); *see*  
14 *also* Tr. 427-79. Plaintiff faults the ALJ for failing to find her degenerative knee  
15 conditions, in conjunction with her left shoulder impairment, do not satisfy Listing  
16 1.02. ECF No. 12 at 8 (citing SSR 17-2p). The Court agrees. As discussed *supra*,  
17 the ALJ failed to credit Dr. Alpern’s testimony that Plaintiff meets Listing 1.02  
18 when her bilateral knee conditions and left shoulder conditions are considered  
19 cumulatively. Plaintiff has (post-surgery) degenerative joint disease in both knees,  
20 which impacts her gait, stability, and mobility and causes pain, tenderness, and

1 swelling. *See, e.g.*, Tr. 413, 280, 380, 499, 510-11, 523-24, 527, 539, 541-42, 555-  
2 56. As a result, Plaintiff uses a cane in her right hand. *See, e.g.*, Tr. 63, 553.  
3 Following Plaintiff's surgery on her left shoulder in 2015, Dr. Ritchey and Dr.  
4 Alpern recommended lifting and overhead restrictions for Plaintiff's left upper  
5 extremity. Tr. 483. Likewise, left upper extremity restrictions were included in  
6 the RFC. Tr. 20. On this record, even though Plaintiff does not use a walker or a  
7 cane in both hands and she therefore does not directly satisfy Listing 1.02, her  
8 limited use of her left shoulder results in the medical equivalent to Listing 1.02.  
9 Moreover, as recognized by Dr. Alpern, Plaintiff is unable to ambulate effectively  
10 for purposes of sustained gainful employment. Tr. 43.

11 The Court concludes that the ALJ erred in finding that Plaintiff's  
12 impairments considered cumulatively did not meet Listing 1.02. Accordingly,  
13 Plaintiff erred in failing to find that Plaintiff was disabled at step three.

#### 14 **C. Step Five**

15 As an alternative basis for remand, at step five, Plaintiff challenges the  
16 ALJ's evaluation of the vocational expert's testimony at step five. ECF No. 12 at  
17 18. At step five of the sequential evaluation analysis, the burden shifts to the  
18 Commissioner to establish that 1) the claimant can perform other work, and 2)

1 such work “exists in significant numbers in the national economy.” 20 C.F.R. §§  
2 404.1560(c)(2); 416.960(c)(2); *Beltran*, 700 F.3d at 389.

3 First, Plaintiff argues the ALJ failed to resolve a conflict between 1) the  
4 vocational expert’s testimony that the two identified jobs—receptionist and  
5 switchboard operator—required frequent handling and occasional fingering  
6 (receptionist) and constant handling and frequent fingering (switchboard operator)  
7 and 2) the ALJ’s finding that Plaintiff only can occasionally reach overhead with  
8 her left upper extremity. ECF No. 12 at 18-19; Tr. 57, 74-76, 20. The Dictionary  
9 of Occupational Titles (DOT) “is not the sole source of admissible information  
10 concerning jobs.” *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995). Rather  
11 the ALJ may rely on expert testimony that contradicts the DOT if the record  
12 contains persuasive evidence to support the deviation. *Id.* Here, the vocational  
13 expert testified, given his thirty years of experience and industry and professional  
14 resources, that Plaintiff could perform the jobs of receptionist and switchboard,  
15 notwithstanding the identified DOT handling and fingering requirements. Tr. 76.  
16 This testimony serves to resolve the conflict between the identified DOT  
17 requirements and Plaintiff’s ALJ-found limitations. *See* SSR 00-4p, 2000 WL  
18 1898704, at \*2.

19 Second, Plaintiff faults the ALJ for failing to include opined limitations in  
20 the RFC. ECF No. 12 at 9, 11-17. In assessing whether there is work available,



1 the ALJ must rely on complete hypotheticals posed to a vocational expert.  
2 *Nguyen*, 100 F.3d at 1467. The ALJ’s hypothetical must be based on medical  
3 assumptions supported by substantial evidence in the record that reflects all the  
4 claimant’s limitations. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001).  
5 “If an ALJ’s hypothetical does not reflect all of the claimant’s limitations, then the  
6 expert’s testimony has no evidentiary value to support a finding that the claimant  
7 can perform jobs in the national economy.” *Bray*, 554 F.3d at 1228.

8 Plaintiff argues the RFC is deficient because it fails to incorporate many  
9 opined limitations. As discussed, both *supra* and *infra*, by failing to provide  
10 specific and legitimate reasons for discounting the opinions of Dr. Alpern, Dr.  
11 Green, Dr. Miller, Dr. Rogge, and Dr. Richey, the ALJ erred by failing to  
12 incorporate additional limitations into the RFC. This error is consequential to the  
13 disability determination.

#### 14 **D. Remedy**

15 Plaintiff urges this Court to either award benefits or remand for further  
16 proceedings. ECF No. 12 at 1, 20.

17 “The decision whether to remand a case for additional evidence, or simply to  
18 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d  
19 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).  
20 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must

1 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,  
2 1045 (9th Cir. 2017); *Benecke*, 379 F.3d at 595; *Treichler v. Comm’r of Soc. Sec.*  
3 *Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, the Ninth Circuit has  
4 “stated or implied that it would be an abuse of discretion for a district court not to  
5 remand for an award of benefits” when three conditions are met. *Garrison*, 759  
6 F.3d at 1020. Under the credit-as-true rule, the court may remand for an award of  
7 benefits if 1) the record has been fully developed and further administrative  
8 proceedings would serve no useful purpose; 2) the ALJ has failed to provide  
9 legally sufficient reasons for rejecting evidence, whether claimant testimony or  
10 medical opinion; and 3) if the improperly discredited evidence were credited as  
11 true, the ALJ would be required to find the claimant disabled on remand. *Revels*,  
12 874 F.3d at 668. Yet, even where the three prongs have been satisfied, the court  
13 will not remand for immediate payment of benefits if “the record as a whole  
14 creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759 F.3d at  
15 1021.

#### 16 *1. Completeness of the Record*

17 As to the first element, administrative proceedings are generally useful  
18 where the record “has [not] been fully developed,” *Garrison*, 759 F.3d at 1020,  
19 there is a need to resolve conflicts and ambiguities, *Andrews*, 53 F.3d at 1039, or  
20 the “presentation of further evidence . . . may well prove enlightening” in light of

1 the passage of time, *I.N.S. v Ventura*, 537 U.S. 12, 18 (2002). *Cf. Nguyen*, 100  
2 F.3d at 1466–67 (remanding for ALJ to apply correct legal standard, to hear any  
3 additional evidence, and resolve any remaining conflicts); *Byrnes v. Shalala*, 60  
4 F.3d 639, 642 (9th Cir. 1995) (same).

5 Here, the record is sufficiently developed. It contains about 500 pages of  
6 significant evidence, including several treating providers and three consultative  
7 examinations, about Plaintiff’s bilateral knee conditions and her left shoulder and  
8 related treatment. The record contains Plaintiff’s function reports and testimony,  
9 as well as the testimony of the medical examiner and the vocational expert.

## 10 2. *ALJ Error*

11 As discussed *supra*, the ALJ failed to provide legally sufficient reasons,  
12 supported by substantial evidence, for discounting the opinions of Dr. Alpern, Dr.  
13 Ritchey, Dr. Rogge, Dr. Park, Dr. Green, and Dr. Miller. On this record, the  
14 second prong of the credit-as-true rule is met.

## 15 3. *Crediting as True Demonstrates Disability*

16 The third prong of the credit-as-true rule is satisfied for several reasons.  
17 First, if Dr. Alpern’s testimony that Plaintiff satisfies Listing 1.02 when her  
18 impairments are considered cumulatively is credited, then Plaintiff is considered  
19 disabled. Second, if Dr. Alpern’s and Dr. Ritchey’s opinions that Plaintiff would  
20 be absent more than two days a month were credited as true, the ALJ would be

1 required to find Plaintiff disabled. The vocational expert testified that an  
2 individual missing one or more days per month is precluded from substantial  
3 gainful employment. Tr. 77. Third, if Dr. Ritchey's opinion that Plaintiff requires  
4 a job that permits shifting from sitting to standing to walking, walking around  
5 every fifteen minutes, and multiple breaks throughout the day was credited as true,  
6 the ALJ would be required to find Plaintiff disabled. The vocational expert  
7 testified that a person who is off-task ten percent or more during the day is  
8 precluded from substantial gainful employment. Tr. 76-77. Likewise, if Dr. Park's  
9 opinion that Plaintiff was limited to a sitting-only job in a wheelchair for four  
10 hours per day or if Dr. Rogge's testimony that Plaintiff could sit for two hours but  
11 was unable to stand or walk for an hour were credited as true, the ALJ would be  
12 required to find Plaintiff disabled. Tr. 77. Finally, if Dr. Green and Dr. Miller's  
13 opinion that Plaintiff was limited to sitting, standing, and walking one hour each,  
14 as well as one-hour total during an eight-hour work day, was credited as true, the  
15 ALJ would be required to find Plaintiff disabled.

#### 16 *4. Serious Doubt*

17 Finally, the record does not leave serious doubt as to whether Plaintiff is  
18 disabled. *See Garrison*, 759 F.3d at 1021. Plaintiff's impacted mobility due to her  
19 bilateral knee conditions is well documented and agreed to by each of the three  
20 treating physicians, whom offered an opinion, and two examining physicians (one

1 of whom was an orthopedic surgeon). Although the level of effusion and pain that  
2 Plaintiff experiences in her knees and left shoulder waxes and wanes, the record  
3 reveals that if Plaintiff were to work an eight-hour workday, even in a sedentary  
4 position with feet elevated, that Plaintiff's pain would hinder her ability to stay on  
5 task and maintain attendance as tolerated by an employer. Moreover, the credit-as-  
6 true rule is a "prophylactic measure" designed to motivate the Commissioner to  
7 ensure that the record will be carefully assessed and to justify "equitable concerns"  
8 about the length of time which has elapsed since a claimant has filed their  
9 application. *Treichler*, 775 F.3d at 1100. Here, the four-year delay since the date  
10 of the application makes it appropriate for this Court to use its discretion and apply  
11 the credit-as-true doctrine.

12 In sum, under the credit-as-true doctrine, Plaintiff is entitled to benefits both  
13 because she established that she meets Listing 1.02, and in the alternative, the  
14 limitations that should have been included in the RFC would have precluded  
15 competitive employment. The Court therefore reverses and remands for the  
16 calculation and award of benefits.

1  
2 **CONCLUSION**

3 Having reviewed the record and the ALJ's findings, the Court concludes the  
4 ALJ's decision is neither supported by substantial evidence nor free of harmful  
5 legal error. Accordingly, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **GRANTED**.

7 2. Defendant's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.

8 3. The Court enter **JUDGMENT** in favor of Plaintiff REVERSING and  
9 REMANDING the matter to the Commissioner of Social Security for immediate  
10 calculation and award of benefits.

11 The District Court Executive is directed to file this Order, provide copies to  
12 counsel, and **CLOSE THE FILE**.

13 DATED March 25, 2019.

14 s/Mary K. Dimke  
15 MARY K. DIMKE  
16 UNITED STATES MAGISTRATE JUDGE  
17  
18  
19  
20